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### § 25.2523(h)–1 Denial of double deduction.

The value of an interest in property may not be deducted for Federal gift tax purposes more than once with respect to the same donor. For example, assume that D, a donor, transferred a life estate in a farm to D's spouse, S, with a remainder to charity and that D elects to treat the property as qualified terminable interest property. The entire value of the property is deductible under section 2523(f). No part of the value of the property qualifies for a charitable deduction under section 2522 for gift tax purposes.

[T.D. 8522, 59 FR 9663, Mar. 1, 1994]

### § 25.2523(h)–2 Effective dates.

Except as specifically provided, in §§ 25.2523(e)–1(c)(3), 25.2523(f)–1(c)(3), and 25.2523(g)–1(b), the provisions of §§ 25.2523(e)–1(c), 25.2523(f)–1, 25.2523(g)–1, and 25.2523(h)–1 are effective with respect to gifts made after March 1, 1994. With respect to gifts made on or before such date, donors may rely on any reasonable interpretation of the statutory provisions. For these purposes, the provisions of §§ 25.2523(e)–1(c), 25.2523(f)–1, 25.2523(g)–1, and 25.2523(h)–1, (as well as project LR–211–76, 1984–1 C.B., page 598, see § 601.601(d)(2)(ii)(*b*) of this chapter), are considered a reasonable interpretation of the statutory provisions. In addition, the rule in the last sentence of § 25.2523(e)–1(f)(1) regarding the determination of income under applicable local law applies to trusts for taxable years ending after January 2, 2004.

[T.D. 8522, 59 FR 9663, Mar. 1, 1994, as amended by T.D. 9102, 69 FR 21, Jan. 2, 2004]

### § 25.2523(i)–1 Disallowance of marital deduction when spouse is not a United States citizen.

(a) *In general.* Subject to § 20.2056A–1(c) of this chapter, section 2523(i)(1) disallows the marital deduction if the spouse of the donor is not a citizen of the United States at the time of the gift. If the spouse of the donor is a citizen of the United States at the time of the gift, the gift tax marital deduction under section 2523(a) is allowed regardless of whether the donor is a citizen or resident of the United States at the time of the gift, subject to the otherwise applicable rules of section 2523.

(b) *Exception for certain joint and survivor annuities.* Paragraph (a) does not apply to disallow the marital deduction with respect to any transfer resulting in the acquisition of rights by a noncitizen spouse under a joint and survivor annuity described in section 2523(f)(6).

(c) *Increased annual exclusion*—(1) *In general.* In the case of gifts made from a donor to the donor's spouse for which a marital deduction is not allowable under this section, if the gift otherwise qualifies for the gift tax annual exclusion under section 2503(b), the amount of the annual exclusion under section 2503(b) is $100,000 in lieu of $10,000. However, in the case of gifts made after June 29, 1989, in order for the increased annual exclusion to apply, the gift in excess of the otherwise applicable annual exclusion under section 2503(b) must be in a form that qualifies for the marital deduction but for the disallowance provision of section 2523(i)(1). See paragraph (d), *Example 4*, of this section.

(2) *Status of donor.* The $100,000 annual exclusion for gifts to a noncitizen spouse is available regardless of the status of the donor. Accordingly, it is immaterial whether the donor is a citizen, resident or a nonresident not a citizen of the United States, as long as the spouse of the donor is not a citizen of the United States at the time of the gift and the conditions for allowance of the increased annual exclusion have been satisfied. See § 25.2503–2(f).

(d) *Examples.* The principles outlined in this section are illustrated in the following examples. Assume in each of the examples that the donee, *S*, is *D's* spouse and is not a United States citizen at the time of the gift.

*Example 1. Outright transfer of present interest.* In 1995, *D*, a United States citizen, transfers to *S*, outright, 100 shares of *X* corporation stock valued for federal gift tax purposes at $130,000. The transfer is a gift of a present interest in property under section 2503(b). Additionally, the gift qualifies for the gift tax marital deduction except for the disallowance provision of section 2523(i)(1). Accordingly, $100,000 of the $130,000 gift is excluded from the total amount of gifts made during the calendar year by *D* for gift tax purposes.

*Example 2. Transfer of survivor benefits.* In 1995, *D*, a United States citizen, retires from

employment in the United States and elects to receive a reduced retirement annuity in order to provide *S* with a survivor annuity upon *D's* death. The transfer of rights to *S* in the joint and survivor annuity is a gift by *D* for gift tax purposes. However, under paragraph (b) of this section, the gift qualifies for the gift tax marital deduction even though *S* is not a United States citizen.

*Example 3. Transfer of present interest in trust property.* In 1995, *D*, a resident alien, transfers property valued at $500,000 in trust to *S*, who is also a resident alien. The trust instrument provides that the trust income is payable to *S* at least quarterly and *S* has a testamentary general power to appoint the trust corpus. The transfer to *S* qualifies for the marital deduction under section 2523 but for the provisions of section 2523(i)(1). Because *S* has a life income interest in the trust, *S* has a present interest in a portion of the trust. Accordingly, *D* may exclude the present value of *S*'s income interest (up to $100,000) from *D*'s total 1995 calendar year gifts.

*Example 4. Transfer of present interest in trust property.* The facts are the same as in *Example 3*, except that *S* does not have a testamentary general power to appoint the trust corpus. Instead, *D*'s child, *C*, has a remainder interest in the trust. If *S* were a United States citizen, the transfer would qualify for the gift tax marital deduction if a qualified terminable interest property election was made under section 2523(f)(4). However, because *S* is not a U.S. citizen, *D* may not make a qualified terminable interest property election. Accordingly, the gift does not qualify for the gift tax marital deduction but for the disallowance provision of section 2523(i)(1). The $100,000 annual exclusion under section 2523(i)(2) is not available with respect to *D*'s transfer in trust and *D* may not exclude the present value of *S*'s income interest in excess of $10,000 from *D*'s total 1995 calendar year gifts.

*Example 5. Spouse becomes citizen after transfer.* *D*, a United States citizen, transfers a residence valued at $350,000 on December 20, 1995, to *D*'s spouse, *S*, a resident alien. On January 31, 1996, *S* becomes a naturalized United States citizen. On *D*'s federal gift tax return for 1995, *D* must include $250,000 as a gift ($350,000 transfer less $100,000 exclusion). Although *S* becomes a citizen in January, 1996, *S* is not a citizen of the United States at the time the transfer is made. Therefore, no gift tax marital deduction is allowable. However, the transfer does qualify for the $100,000 annual exclusion.

[T.D. 8612, 60 FR 43552, Aug. 22, 1995]

### § 25.2523(i)–2 Treatment of spousal joint tenancy property where one spouse is not a United States citizen.

(a) *In general.* In the case of a joint tenancy with right of survivorship between spouses, or a tenancy by the entirety, where the donee spouse is not a United States citizen, the gift tax treatment of the creation and termination of the tenancy (regardless of whether the donor is a citizen, resident or nonresident not a citizen of the United States at such time), is governed by the principles of sections 2515 and 2515A (as such sections were in effect before their repeal by the Economic Recovery Tax Act of 1981). However, in applying these principles, the donor spouse may not elect to treat the creation of a tenancy in real property as a gift, as provided in section 2515(c) (prior to its repeal by the Economic Recovery Tax Act of 1981, Pub. L. 97–34, 95 Stat. 172).

(b) *Tenancies by the entirety and joint tenancies in real property*—(1) *Creation of the tenancy on or after July 14, 1988.* Under the principles of section 2515 (without regard to section 2515(c)), the creation of a tenancy by the entirety (or joint tenancy) in real property (either by one spouse alone or by both spouses), and any additions to the value of the tenancy in the form of improvements, reductions in indebtedness thereon, or otherwise, is not deemed to be a transfer of property for purposes of the gift tax, regardless of the proportion of the consideration furnished by each spouse, but only if the creation of the tenancy would otherwise be a gift to the donee spouse who is not a citizen of the United States at the time of the gift.

(2) *Termination*—(i) *Tenancies created after December 31, 1954 and before January 1, 1982 not subject to an election under section 2515(c), and tenancies created on or after July 14, 1988.* When a tenancy to which this paragraph (b) applies is terminated on or after July 14, 1988, other than by reason of the death of a spouse, then, under the principles of section 2515, a spouse is deemed to have made a gift to the extent that the proportion of the total consideration furnished by the spouse, multiplied by the proceeds of the termination